

STATE OF MICHIGAN
COURT OF APPEALS

SPOONER CONSTRUCTION, INC.,

Plaintiff-Appellee,

v

DAVID JACKSON and MICHELLE JACKSON,

Defendants-Appellants.

UNPUBLISHED

January 15, 2008

No. 274930

Oakland Circuit Court

LC No. 2005-070926-CZ

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

In this suit for breach of contract, defendants appeal as of right the trial court's grant of summary disposition in favor of plaintiff. Because we conclude that there was a question of fact on both defendants' and plaintiff's claim that the other party breached the contract, we reverse in part the trial court's grant of summary disposition and remand for further proceedings.

I

In July 1998, plaintiff agreed to build a home for defendants for approximately \$330,000. The parties attended a closing in January 2000. At the closing, defendants issued two checks to plaintiff to cover the final amounts due on the construction project. One check was in the amount of \$13,000 and the other in the amount of \$18,558. Defendants claim that the parties agreed that plaintiff could negotiate the \$13,000 check, but that it would not negotiate the \$18,558 check until after plaintiff corrected or completed several disputed work items on the home. Plaintiff contends that there was no such agreement. After the closing, plaintiff successfully negotiated the check for \$13,000. But the check for \$18,558 was returned for insufficient funds. Thereafter, defendants released \$5,000 in escrowed funds to plaintiff.

In August 2005, plaintiff sued defendants for breach of contract. In its complaint, plaintiff alleged that defendants breached the contract by failing to pay the remaining balance due on the construction of the home. Plaintiff alleged that the remaining balance was \$13,558, which corresponds to the face value of the check returned for insufficient funds minus the \$5,000 released from escrow.

Defendants answered the complaint by alleging that plaintiff failed to timely and satisfactorily complete the home, which breach, defendants contended, was an affirmative defense to plaintiff's claim. Defendants also alleged that they issued the \$18,558 check on

condition that plaintiff complete certain incomplete and poorly completed items on the home and, therefore, that plaintiff was not free to negotiate that check until it completed those items. Defendants stated they released the \$5,000 in escrowed funds based on plaintiff's representation that it needed the funds to complete the disputed items. Based on these allegations, defendants filed four counterclaims against plaintiff. Defendants claimed that plaintiff abandoned the construction project, fraudulently induced them to issue the \$18,558 check and escrowed funds, breached the contract by failing to timely and satisfactorily complete the home and claimed that plaintiff agreed that it received full payment when it accepted the escrowed funds and, thereby, released and discharged defendants from any further obligation to pay.

In October 2006, defendants moved for summary disposition of their counterclaims under MCR 2.116(C)(10). Defendants alleged that defendant breached the contract to construct the home by failing to complete certain items and failing to repair other items that were poorly or improperly constructed. Defendants supported their motion, in part, with their own affidavit and two "punch lists" that purport to show the items that plaintiff had not completed or needed to repair.

Plaintiff responded with its own motion for summary disposition under MCR 2.116(C)(10). In its motion, plaintiff primarily attempted to refute defendants' support for their motion for summary disposition. To this end, plaintiff attempted to show that defendant David Jackson's deposition testimony revealed that defendants' claims were without foundation. Plaintiff also characterized defendants' affidavit as self-serving and not worthy of consideration because it was unsupported by proof that the home was not completed in a workmanlike manner. Finally, plaintiff argued that Michigan law did not support defendants' claim that the \$18,558 check was not negotiable. Plaintiff contended that only specified defenses, including infancy, duress, lack of legal capacity, illegality and fraud, were sufficient to negate the right to enforce a check. For these reasons, plaintiff asked the trial court to grant summary disposition in its favor for \$18,558.

After a brief hearing held on November 15, 2006, the trial court granted plaintiff's motion and denied defendants' motion. This appeal followed.

II

Defendants first argue that the trial court erred when it granted plaintiff's motion for summary disposition. We agree.

This Court reviews de novo a trial court's decision to grant summary disposition. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 153; 721 NW2d 233 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* Summary disposition is appropriate if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

Although plaintiff concentrated the majority of its arguments in its summary disposition brief on refuting the evidence presented by defendants in support of their motion for summary disposition, plaintiff did indirectly establish that plaintiff entered into a contract to build a home and that the check for \$18,558 was returned for insufficient funds. Further, while attempting to refute defendants' claim that plaintiff fraudulently induced defendants to release the escrowed

funds, plaintiff noted that defendants acknowledged that Robert Spooner testified at his deposition that plaintiff had completed the work on the home by the end of January 2000. Hence, plaintiff presented evidence to support its claim that there was a contract, plaintiff fully performed the contract and defendants breached the contract by failing to pay the remaining balance due. See *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005) (noting the elements of a valid contract) and *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003) (noting that a party asserting a breach of contract must prove damages resulting from the breach). Notwithstanding this, plaintiff acknowledged that defendants submitted an affidavit wherein they claimed that plaintiff failed to complete the home and repair substandard work and submitted “punch lists” that detailed work that plaintiff allegedly did not complete or repair. We conclude that this evidence was sufficient to create a question of fact as to whether either of the parties breached the contract. *Hamade, supra* at 153.

Before the trial court and on appeal, plaintiff contends that this evidence was insufficient to create a question of fact because the affidavit was self-serving and unsupported by admissible factual evidence that the work was substandard and establishing the cost to repair. We do not agree. Defendants could properly aver that the home was not built to workmanlike standards based on their personal experiences with the alleged defects and persons hired to repair the defects. Defendants clearly identify several problems that had to be addressed by hiring contractors to perform additional work and stated the actual cost to have that work done. This evidence, if believed by the finder of fact, could support a finding that plaintiff breached the contract. Further, the punch list with the January 20, 2000 date indicates several items that needed to be done or repaired and identifies the persons responsible to perform those tasks. This list, coupled with defendants’ averment that the work was not done, could also support a finding that plaintiff breached the contract. Because there was a question of fact as to whether plaintiff had properly completed the work under the contract, the trial court erred when it granted summary disposition in favor of plaintiff on its breach of contract claim. MCR 2.116(C)(10).

Despite the existence of a question of fact on its breach of contract claim, plaintiff nevertheless argues that the trial court properly granted summary disposition in favor of plaintiff based on its claim under Article 3 of Michigan’s Uniform Commercial Code (UCC). We do not agree.

First, we note that the trial court specifically stated on the record that it was granting plaintiff’s motion for summary disposition on its claim of breach of contract. Although the trial court mentioned that the check was payable on demand, it did so in the context of analyzing the evidence in support of defendants’ claim that plaintiff fraudulently induced defendants to issue the check. Furthermore, plaintiff never pleaded a claim under the UCC based on the return of the check for insufficient funds. Because defendants were not placed on notice of this claim, they were not able to assert a proper defense. See MCR 2.111(B)(1). Indeed, had this claim been properly brought, defendants could readily have asserted the three-year period of limitations applicable to actions to enforce a check. See MCL 440.3118(3). Furthermore, notwithstanding plaintiff’s arguments to the contrary, defendants were entitled to assert breach of contract as a defense to the enforcement of the check. See MCL 440.3305(1)(b); see also official comment 2 to MCL 440.3305. Defendants would only have been limited to the defenses listed under MCL 440.3305(1)(a) if plaintiff were a holder in due course. See MCL 440.3305(2). And plaintiff failed to present any evidence that it was a holder in due course. See MCL 440.3302.

Therefore, even if this claim were properly pleaded in plaintiff's complaint, because there is a question of fact on whether plaintiff breached the contract for which payment was made, plaintiff would not be entitled to summary disposition in its favor based on this claim. Therefore, to the extent that the trial court granted summary disposition in favor of plaintiff based on the UCC, it erred.

III

Defendants next argue that the trial court erred when it failed to grant summary disposition in their favor on their counterclaims. We do not agree.

Defendants pleaded four claims in their counter-complaint: (1) abandonment, (2) fraudulent inducement, (3) breach of contract and (4) payment, release and discharge. Defendant's allegations of payment, release, discharge and fraudulent inducement are actually defenses to a contract claim. See MCR 2.116(F)(3)(a) (noting that payment, release and discharge are affirmative defenses) and 46th *Circuit Trial Court v Crawford County*, 266 Mich App 150, 160; 702 NW2d 588 (2005) (noting that fraud in the inducement is a defense to the formation of a contract), rev'd not in relevant part 476 Mich 131 (2006). As pleaded by defendants, these claims cannot serve as an independent basis for awarding plaintiff relief.¹ MCR 2.116(C)(8). Therefore, the trial court properly granted summary disposition in favor of plaintiff on these claims.² Furthermore, although defendants characterize their first counterclaim as abandonment, it is in effect a mere restatement of their breach of contract claim in different form. Hence, the only claim properly presented by defendants was a claim that defendant breached the construction contract by failing to complete portions of the home and repair the purported defects in other portions of the home.

Defendants submitted sufficient evidence to support their claim that plaintiff breached the contract on these bases. However, defendants acknowledged that Spooner testified at his deposition that he believed that the home was properly completed. Further, plaintiff presented evidence that the funds held in escrow were held to ensure that plaintiff completed the project. And plaintiff presented evidence that defendants voluntarily released these funds to plaintiff. A finder of fact could conclude on the basis of this evidence that plaintiff did in fact satisfactorily complete the home and, consequently, was entitled to full and final payment on the contract.

¹ To the extent that defendants were alleging a claim based on a promise made in bad faith, we conclude that defendants' failed to present evidence sufficient to conclude that plaintiff had no intention of completing the home or making the repairs when it allegedly promised to do so in exchange for the issuance of the checks and release of the escrowed funds. See *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989).

² We note that the trial court should have granted summary disposition of these claims under MCR 2.116(C)(8) rather than (C)(10). Nevertheless, if the trial court granted summary disposition under the wrong subpart of the court rule, this Court may still review the motion as long as the record permits review under the correct subpart. *Detroit News, Inc v Policemen and Firemen Retirement Sys of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002).

Therefore, there was a question of fact on defendants' breach of contract claim. *Hamade, supra* at 153.

IV

The trial court did not err when it granted summary disposition in favor of plaintiff on defendants' counterclaims for abandonment, fraudulent inducement and payment, release and discharge. However, the trial court erred when it granted summary disposition in favor of plaintiff on the parties' breach of contract claims.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski